

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARIE MATHEWS,

Plaintiff,

V.

COMMISSIONER OF SOCIAL
SECURITY.

Defendant.

NO: 1:16-CV-03196-FVS

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary

judgment. ECF Nos. 13 and 14. This matter was submitted for consideration

without oral argument. The plaintiff is represented by Attorney D. James Tree

The defendant is represented by Special Assistant United States Attorney Daphne

completed briefing and is fully informed. For the reasons discussed below, the

1 court **GRANTS** Defendant's Motion for Summary Judgment, ECF No. 14, and
2 **DENIES** Plaintiff's Motion for Summary Judgment, ECF No. 13.

3 **JURISDICTION**

4 Plaintiff Marie M. Mathews protectively filed for supplemental security
5 income and disability insurance benefits on April 23, 2013. Tr. 192-98. Plaintiff
6 alleged an onset date of July 15, 2009, which was amended at the hearing to May
7 3, 2011. Tr. 36, 192, 199. Benefits were denied initially (Tr. 109-12) and upon
8 reconsideration (Tr. 117-28). Plaintiff requested a hearing before an administrative
9 law judge ("ALJ"), which was held before ALJ Tom L. Morris on January 29,
10 2015. Tr. 33-70. Plaintiff was represented by counsel and testified at the hearing.
11 *Id.* The ALJ denied benefits (Tr. 13-32) and the Appeals Council denied review.
12 Tr. 1. The matter is now before this court pursuant to 42 U.S.C. §§ 405(g);
13 1383(c)(3).

14 **BACKGROUND**

15 The facts of the case are set forth in the administrative hearing and
16 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner,
17 and will therefore only the most pertinent facts are summarized here.

18 Marie M. Mathews ("Plaintiff") was 45 years old at the time of the hearing.
19 Tr. 35. She testified that she finished high school. Tr. 35. In 1988, Plaintiff was
20 in a motorcycle accident and had surgery on her left leg, which resulted in visible

1 surgical changes on examination, leg length discrepancy with left leg shorter, and
2 deformities in her left ankle. *See* Tr. 303, 305, 343. Plaintiff lives with her
3 husband, who is self-employed and works full time outside the home. Tr. 42, 55.
4 Plaintiff has work history as a check cashier. Tr. 43 59-60, 240. The record
5 indicates Plaintiff was “let go” from her job in 2009, because she was “holding on
6 to a check that they felt she shouldn’t have and was against their policy.” Tr. 220,
7 240, 384. She then received unemployment for a little less than two years. Tr. 36.

8 Plaintiff testified that the main reason she cannot work at any job is swelling
9 in her left foot and back pain; and she testified that she “would” do a job if they
10 would let her lie down when she was in pain. Tr. 44, 50. She reported she can
11 stand for half an hour to an hour in one place “without assistance;” can walk for
12 about half an hour; and lies down with her legs elevated at least four times a day or
13 more. Tr. 44-45, 48-50. She reported that she uses a cane when she goes to the
14 grocery store, around the house, going to get the mail, and when she was working
15 as a cashier to help her “get up to the counter to help customers.” Tr. 46. The cane
16 was not prescribed. Tr. 52. Plaintiff alleges disability due to left leg pain. *See* Tr.
17 109, 117.

18 **STANDARD OF REVIEW**

19 A district court’s review of a final decision of the Commissioner of Social
20 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is

1 limited; the Commissioner’s decision will be disturbed “only if it is not supported
2 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
3 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a
4 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
5 (quotation and citation omitted). Stated differently, substantial evidence equates to
6 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and
7 citation omitted). In determining whether the standard has been satisfied, a
8 reviewing court must consider the entire record as a whole rather than searching
9 for supporting evidence in isolation. *Id.*

10 In reviewing a denial of benefits, a district court may not substitute its
11 judgment for that of the Commissioner. If the evidence in the record “is
12 susceptible to more than one rational interpretation, [the court] must uphold the
13 ALJ’s findings if they are supported by inferences reasonably drawn from the
14 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district
15 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
16 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
17 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The
18 party appealing the ALJ’s decision generally bears the burden of establishing that
19 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

20 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

1 A claimant must satisfy two conditions to be considered “disabled” within
2 the meaning of the Social Security Act. First, the claimant must be “unable to
3 engage in any substantial gainful activity by reason of any medically determinable
4 physical or mental impairment which can be expected to result in death or which
5 has lasted or can be expected to last for a continuous period of not less than twelve
6 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
7 impairment must be “of such severity that she is not only unable to do his previous
8 work[,] but cannot, considering [his or her] age, education, and work experience,
9 engage in any other kind of substantial gainful work which exists in the national
10 economy.” 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

11 The Commissioner has established a five-step sequential analysis to
12 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
13 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
14 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
15 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
16 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
17 404.1520(b); 416.920(b).

18 If the claimant is not engaged in substantial gainful activity, the analysis
19 proceeds to step two. At this step, the Commissioner considers the severity of the
20 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the

1 claimant suffers from “any impairment or combination of impairments which
2 significantly limits [his or her] physical or mental ability to do basic work
3 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
4 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
5 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
6 §§ 404.1520(c); 416.920(c).

7 At step three, the Commissioner compares the claimant’s impairment to
8 severe impairments recognized by the Commissioner to be so severe as to preclude
9 a person from engaging in substantial gainful activity. 20 C.F.R. §§
10 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
11 severe than one of the enumerated impairments, the Commissioner must find the
12 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

13 If the severity of the claimant’s impairment does not meet or exceed the
14 severity of the enumerated impairments, the Commissioner must pause to assess
15 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
16 defined generally as the claimant’s ability to perform physical and mental work
17 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
18 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
19 analysis.

1 At step four, the Commissioner considers whether, in view of the claimant's
2 RFC, the claimant is capable of performing work that he or she has performed in
3 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
4 If the claimant is capable of performing past relevant work, the Commissioner
5 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
6 If the claimant is incapable of performing such work, the analysis proceeds to step
7 five.

8 At step five, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing other work in the national economy.
10 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
11 the Commissioner must also consider vocational factors such as the claimant's age,
12 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
13 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
14 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
15 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
16 work, analysis concludes with a finding that the claimant is disabled and is
17 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

18 The claimant bears the burden of proof at steps one through four above.
19 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
20 step five, the burden shifts to the Commissioner to establish that (1) the claimant is

1 capable of performing other work; and (2) such work “exists in significant
2 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.920(c)(2);
3 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

4 **ALJ’S FINDINGS**

5 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
6 activity since May 3, 2011, the amended alleged onset date. Tr. 18. At step two,
7 the ALJ found Plaintiff has the following severe impairments: left ankle deformity
8 and shortening of the left leg related to a prior injury, and osteoarthritis of the left
9 knee. Tr. 18. At step three, the ALJ found that Plaintiff does not have an
10 impairment or combination of impairments that meets or medically equals the
11 severity of a listed impairment. Tr. 19. The ALJ then found that Plaintiff has the
12 RFC

13 to perform sedentary work as defined in 20 CFR 404.1567(a) and
14 416.967(a). Specifically, she can occasionally lift and carry 20 pounds and
frequently lift and carry 10 pounds. She can stand and/or walk (with normal
breaks) for a total [of] about 2 hours in an 8-hour workday and sit (with
normal breaks) for a total [of] about 6 hours in an 8-hour workday.
15 Standing/walking is limited to 20 minutes an occurrence before needing to
sit again for 20 minutes. She cannot use her left lower extremity for pushing
and/or pulling (including operation of foot controls). She is limited to
16 occasional stooping, kneeling, crouching, crawling, and climbing ramp and
stairs. She cannot climb ladders, ropes, or scaffolds. She needs to avoid
17 concentrated exposure to extreme cold and vibrations and even moderate
exposure to hazards such as working around dangerous machinery or
18 unprotected heights. She will need one additional break of customary
duration without leaving working area.
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20

1 Tr. 19. At step four, the ALJ found that Plaintiff is unable to perform any past
2 relevant work. Tr. 25. At step five, the ALJ found that considering Plaintiff's age,
3 education, work experience, and RFC, there are jobs that exist in significant
4 numbers in the national economy that Plaintiff can perform, such as document
5 preparer, telephone information clerk, and escort-vehicle driver. Tr. 26-27. On
6 that basis, the ALJ concluded that Plaintiff has not been under a disability, as
7 defined in the Social Security Act, from May 3, 2011, through the date of the
8 decision. Tr. 27.

9 **ISSUES**

10 Plaintiff seeks judicial review of the Commissioner's final decision denying
11 her disability benefits under Title II and supplemental security income benefits
12 under Title XVI of the Social Security Act. ECF No. 13. Plaintiff raises the
13 following issues for this Court's review:

14 1. Whether the ALJ improperly discredited Plaintiff's symptom claims;
15 2. Whether the ALJ properly weighed the medical opinion evidence; and
16 3. Whether the ALJ erred by failing to develop the record.

17 **DISCUSSION**

18 **A. Plaintiff's Symptom Claims**

19 An ALJ engages in a two-step analysis to determine whether a claimant's
20 testimony regarding subjective pain or symptoms is credible. "First, the ALJ must

1 determine whether there is objective medical evidence of an underlying
2 impairment which could reasonably be expected to produce the pain or other
3 symptoms alleged.” *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).
4 “The claimant is not required to show that her impairment could reasonably be
5 expected to cause the severity of the symptom she has alleged; she need only show
6 that it could reasonably have caused some degree of the symptom.” *Vasquez v.*
7 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

8 Second, “[i]f the claimant meets the first test and there is no evidence of
9 malingering, the ALJ can only reject the claimant’s testimony about the severity of
10 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
11 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
12 citations and quotations omitted). “General findings are insufficient; rather, the
13 ALJ must identify what testimony is not credible and what evidence undermines
14 the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th
15 Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ
16 must make a credibility determination with findings sufficiently specific to permit
17 the court to conclude that the ALJ did not arbitrarily discredit claimant’s
18 testimony.”). “The clear and convincing [evidence] standard is the most
19 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,

1 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920,
2 924 (9th Cir. 2002)).

3 In making an adverse credibility determination, the ALJ may consider, *inter*
4 *alia*, (1) the claimant's reputation for truthfulness; (2) inconsistencies in the
5 claimant's testimony or between her testimony and her conduct; (3) the claimant's
6 daily living activities; (4) the claimant's work record; and (5) testimony from
7 physicians or third parties concerning the nature, severity, and effect of the
8 claimant's condition. *Thomas*, 278 F.3d at 958-59.

9 Here, the ALJ found Plaintiff's impairments could reasonably be expected to
10 cause the alleged symptoms; however, Plaintiff's "statements concerning the
11 intensity, persistence and limiting effects of these symptoms are not entirely
12 credible." Tr. 20. Plaintiff argues the ALJ erred by rejecting Plaintiff's testimony
13 as not credible. ECF No. 13 at 4-13.

14 As an initial matter, the Court agrees with Plaintiff that several reasons
15 offered by the ALJ were "insufficient" under the clear and convincing standard.
16 ECF No. 13 at 5-10. First, the ALJ noted that Plaintiff applied for a job in 2011, as
17 she was required to do in order to receive unemployment benefits; and found
18 "[t]his evidence suggests a lack of motivation on the part of [Plaintiff] and raises
19 the concern of secondary gain motivation." Tr. 24. However, Defendant concedes
20 "that the ALJ erred in rejecting Plaintiff's subjective complaints on the basis of her

1 receipt of unemployment benefits because the record does not clearly establish
2 whether she held [her]self out as available for full-time work to receive
3 unemployment.” ECF No. 14 at 11 (citing *Carmickle*, 533 F.3d at 1162). Second,
4 the ALJ found Plaintiff “made inconsistent statements relevant to the issue of
5 disability.” Tr. 23. In evaluating credibility, the ALJ may consider inconsistencies
6 in Plaintiff’s testimony or between his testimony and his conduct. *Thomas*, 278
7 F.3d at 958-59; *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (in making a
8 credibility evaluation, the ALJ may rely on ordinary techniques of credibility
9 evaluation). In support of this finding, the ALJ cited the following alleged
10 inconsistencies: (1) Plaintiff testified to using a cane, but admitted it was not
11 prescribed; and (2) Plaintiff claimed she had to lie down multiple times a day, but
12 this limitation was not mentioned in the treating physician’s clinical notes. Tr. 23.
13 Plaintiff argues the ALJ’s “reasoning should be rejected as it fails to demonstrate
14 any actual ‘inconsistent statements.’” ECF No. 13 at 8-9. The Court agrees. First,
15 as to Plaintiff’s use of a cane, the ALJ fails to cite evidence of inconsistencies in
16 Plaintiff’s own statements; nor does the Court discern how the lack of prescription,
17 standing alone, qualifies as substantial evidence of an alleged inconsistency
18 sufficient to undermine Plaintiff’s overall credibility. Tr. 23. Moreover, Plaintiff’s
19 treating provider opined that the cane *is* medically necessary, and the overall
20 record includes references to Plaintiff’s use of a cane. Tr. 217, 345, 363, 390; *Cf.*

1 *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999) (finding use of a cane was
2 inconsistent with the medical evidence because no doctor indicated he used or
3 needed a cane, and two doctors specifically noted claimant did not need an
4 assistive device). Similarly, the ALJ fails to cite any inconsistent statement *by*
5 *Plaintiff* regarding her need to lie down during the day; rather, the ALJ relies on
6 alleged inconsistencies between the treating provider's opinion and his treatment
7 notes, which is better suited to an analysis of the weight granted to the treating
8 provider's opinion, as discussed below, as opposed to Plaintiff's credibility. *See*
9 Tr. 23. Thus, the Court finds these reasons for finding Plaintiff "not entirely
10 credible" were not clear and convincing. However, the error is harmless because,
11 as discussed below, the ALJ gave additional reasons, supported by substantial
12 evidence, for discrediting Plaintiff's symptom complaints. *See Carmickle*, 533
13 F.3d at 1162-63.

14 First, the ALJ found "the medical evidence does not support [Plaintiff's]
15 allegations of debilitating symptoms or limitations; [and] [h]er subjective
16 complaints and allegations are out of proportion to the physical findings and are
17 without clinical/laboratory findings." Tr. 21. Subjective testimony cannot be
18 rejected solely because it is not corroborated by objective medical findings, but
19 medical evidence is a relevant factor in determining the severity of a claimant's
20 impairments. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). Here, the

1 Court may decline to address this issue because it was not argued with specificity
2 in the opening brief. *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d
3 1155, 1161 n.2 (9th Cir. 2008). Moreover, the ALJ set out, in detail, the medical
4 evidence contradicting Plaintiff's claims of disabling limitations during the
5 relevant adjudicatory period, including: multiple reports by Plaintiff that her pain is
6 "tolerable" and her condition is "stable" (Tr. 290, 296, 299, 302); and largely
7 benign physical examination findings that included two references to some edema
8 and limited range of motion. Tr. 290, 293, 303, 306. The ALJ additionally noted
9 that after the amended alleged onset date, Plaintiff's treatment history of record is
10 entirely comprised of seven visits with her treating physician. Tr. 22, 289-307,
11 384-86; *See Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005) (minimal
12 objective evidence is a factor which may be relied upon in discrediting a claimant's
13 testimony, although it may not be the only factor). The lack of corroboration of
14 Plaintiff's claimed limitations by the objective medical evidence, was a clear and
15 convincing reason, supported by substantial evidence, for the ALJ to find Plaintiff
16 not entirely credible.

17 Second, the ALJ found Plaintiff "did not generally receive the extent of
18 treatment one would expect for a totally disabled individual, which suggests that
19 her pain and other symptoms were not as serious as alleged in connection with this
20 application and appeal. Despite her complaints, [Plaintiff] did not seek or receive

1 treatment from a specialist; all treatment was rendered by general practitioner.”
2 Tr. 22. In support of this argument, the ALJ noted that Plaintiff only saw her
3 treating physician, Dr. Patrick R. Waber, “on seven occasions since the amended
4 alleged onset date.” Tr. 22, 289-307, 384-86. Unexplained, or inadequately
5 explained, failure to seek treatment or follow a prescribed course of treatment may
6 be the basis for an adverse credibility finding unless there is a showing of a good
7 reason for the failure. *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). Thus, an
8 ALJ “will not find an individual’s symptoms inconsistent with the evidence in the
9 record on this basis without considering possible reasons he or she may not comply
10 with treatment or seek treatment consistent with the degree of his or her
11 complaints.” Social Security Ruling (“SSR”) 16-3p at *8-*9 (March 16, 2016),
12 *available at* 2016 WL 1119029 (“[a]n individual may not be able to afford
13 treatment and may not have access to free or low-cost medical services”). Here,
14 the ALJ considered Plaintiff’s explanation that she did not seek treatment, and at
15 times did not refill her prescriptions, due to inability to afford treatment and/or her
16 lack of insurance coverage, as follow:

17 At the hearing, [Plaintiff] testified that the last time she went to the State
18 about obtaining medical insurance was in 2009 or 2010 but she was denied
19 because of assets. She admitted she had not applied again nor had she
20 applied for ‘Obama Care’ since it came into operation. Yet, she complains
about not being able to afford her blood pressure medication. This seems
inconsistent with the disabling level of pain to which she testified given that
she has not even tried to get some form of assistance even when [sic]
became more available for those with financial difficulties.

1 Tr. 22. Plaintiff cites her reports to treating physician, Dr. Waber, that she could
2 not afford to seek or continue a prescribed course of treatment, and contends that
3 the ALJ “failed to clearly or convincingly demonstrate why this reason was not
4 believable.”¹ ECF No. 13 at 6-7 (citing Tr. 289, 305, 328, 334-35, 384). Plaintiff
5 further argued that the “ALJ’s reasoning is based upon unwarranted supposition
6 that [Plaintiff] would have been eligible for assisted coverage, but even if this were
7 true, it would not support the ALJ’s improper inference that her lack of treatment
8 was due to less severe symptoms rather than her lack of insurance coverage.” ECF
9 No. 13 at 6. However, a plain reading of the ALJ’s decision indicates that he relied
10 on the inconsistency between Plaintiff’s admitted lack of effort in seeking to obtain
11 insurance and her alleged “disabling level of pain;” rather than any “unwarranted
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14 ¹ The ALJ also noted that Plaintiff “was receiving State assistance and was not
15 totally precluded from receiving medical treatment.” Tr. 23. Defendant concedes
16 that the ALJ did not support this finding with evidence from the record. ECF No.
17 14 at 5 n.1. However, this error is harmless because, as discussed herein, the
18 ALJ’s consideration of Plaintiff’s failure to seek treatment, and the ultimate
19 credibility finding, was supported by substantial evidence. *See Carmickle*, 533
20 F.3d at 1162-63.

1 supposition” that she would have been eligible had she applied. Tr. 22. A finding
2 by the ALJ that the proffered reason is not believable, can cast doubt on the
3 sincerity of the claimant’s pain testimony. *Fair*, 885 F.2d at 603; *Smolen*, 80 F.3d
4 at 1284 (ALJ may rely on ordinary techniques of credibility evaluation).
5 Moreover, even if the evidence may be interpreted more favorably to Plaintiff, it is
6 susceptible to more than one rational interpretation, and therefore the ALJ’s
7 conclusion must be upheld. *See Burch*, 400 F.3d at 679. Thus, Plaintiff’s failure
8 to seek treatment, even in light of her explanation that she did not seek or comply
9 with treatment due to financial constraints, was reasonably considered by the ALJ
10 as “suggest[ing] that her pain and other symptoms were not as serious as alleged.”
11 Tr. 22. This was a clear and convincing reason to find the Plaintiff not entirely
12 credible.

13 Third, the ALJ found Plaintiff’s activities of daily living “were not limited to
14 the extent one would expect given her complaints of disabling symptoms and
15 limitations.” Tr. 23. It is well-settled that a claimant need not be utterly
16 incapacitated in order to be eligible for benefits. *Fair*, 885 F.2d at 603; *see also*
17 *Orn*, 495 F.3d at 639 (“the mere fact that a plaintiff has carried on certain
18 activities...does not in any way detract from her credibility as to her overall
19 disability.”). Regardless, as in this case, even where activities “suggest some
20 difficulty functioning, they may be grounds for discrediting the [Plaintiff’s]

1 testimony to the extent that they contradict claims of a totally debilitating
2 impairment.” *Molina*, 674 F.3d at 1113. In portions of the record cited by the
3 ALJ, Plaintiff reported being able to attend to her personal care, do laundry and
4 light cleaning, and cook meals daily. Tr. 23 (citing Tr. 256-57, 268, 278). Plaintiff
5 also testified that her husband was self-employed and not home during the day to
6 help her; she could stand for 30 minutes to an hour without assistance; she could
7 do laundry and wash dishes by sitting on a chair when needed; she had a driver’s
8 license and drove herself to the store and appointments; she could walk for more
9 than 30 minutes (and did not mention needing a motorized cart); and she spent
10 time reading (30 minutes), on the computer playing video games and being on
11 Facebook (60 minutes), and watching television (4 hours). Tr. 23-24, 42, 45, 52-
12 58. Finally, as noted by the ALJ, Plaintiff testified that she watched her
13 grandchildren (age 3 and 6) by herself; and reported to Dr. Waber in September
14 2012 that she was “now getting back to work” and “has been quite busy” and
15 “taking care of her grandchildren.” Tr. 24, 41, 292; *see Rollins*, 261 F.3d at 857
16 (Plaintiff’s ability to care for young children without help may undermine claims
17 of totally disabling pain).

18 Plaintiff generally argues that the ALJ erred by “merely provid[ing] a list of
19 activities with no explanation how any of these activities contradict the ALJ’s
20 vague and undefined expectation of ‘what one would expect’ a disabled person to

1 be able to perform.” ECF No. 13 at 11. Plaintiff is correct that “[g]eneral findings
2 are insufficient; rather, the ALJ must identify what testimony is not credible and
3 what evidence undermines the claimant’s complaints.” *Id.* (citing *Lester*, 81 F.3d
4 at 834). However, Plaintiff’s extensive daily activities outlined above, including
5 caring for young children without assistance; was reasonably considered by the
6 ALJ as inconsistent with Plaintiff’s complaints of entirely disabling limitations.

7 *See Burch*, 400 F.3d at 679 (where evidence is susceptible to more than one
8 interpretation, the ALJ’s conclusion must be upheld); *see also Andrews v. Shalala*,
9 53 F.3d 1035, 1039 (9th Cir. 1995) (“[t]he ALJ is responsible for determining
10 credibility”). This was a clear and convincing reason to find Plaintiff not entirely
11 credible.

12 Fourth, and finally, the ALJ noted evidence that Plaintiff “stopped working
13 for reasons not related to the allegedly disabling impairments.” Tr. 24. An ALJ
14 may consider that a claimant stopped working for reasons unrelated to the
15 allegedly disabling condition in making a credibility determination. *See Bruton v.*
16 *Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (the fact that the claimant left his job
17 because he was laid off, rather than because he was injured, was a clear and
18 convincing reason to find him not credible). In support of this finding, the ALJ
19 relies on Plaintiff’s admission that “she was let go because she was holding on to
20 [a] check that they felt she shouldn’t have and was against their policy.” Tr. 24

1 (citing Tr. 220, 384). The ALJ further noted that “objective medical evidence
2 reveals that her alleged[] impairments were present at approximately the same
3 level of severity prior to the amended alleged onset date. The fact that the
4 impairments did not prevent [Plaintiff] from working then strongly suggest they
5 would not currently prevent work activity.” Tr. 24. Plaintiff argues (1) that the
6 ALJ “fails to account” for the treating physician’s opinion that Plaintiff’s back pain
7 was “progressive,” and Plaintiff’s subjective complaint that it had been “worsening
8 over the past 18 months;” and (2) the treating physician’s note that Plaintiff had
9 “frequent time off” from work since her injury in 1988, and her report that there
10 were times she could not work “more than 5 days a month.” ECF No. 13 at 12-13
11 (citing Tr. 381-84). However, the ALJ specifically relied on “objective medical
12 evidence” to support his finding, as opposed to the subjective complaints and
13 medical opinion evidence offered by Plaintiff to support her argument. A review
14 of the record indicates that objective examination findings, both before and after
15 the amended alleged onset date, are “approximately the same level of severity,”
16 and include: “surgical changes” from the 1988 surgery on her left leg, mild edema
17 at times, tenderness to palpation at times, and limited range of motion of the left
18 ankle. *See* Tr. 293, 303, 328 (“some edema that is really unchanged”), 337
19 (findings are “really unchanged”), 349 (“no real changes are noted”), 377, 379,
20 385. Thus, regardless of evidence that could be considered favorable to the

1 Plaintiff, the ALJ's finding that Plaintiff stopped working for reasons "unrelated to
2 her alleged impairments," was a clear and convincing reason to find her not
3 entirely credible. *See Molina*, 674 F.3d at 1111 (if evidence in the record "is
4 susceptible to more than one rational interpretation, [the court] must uphold the
5 ALJ's findings if they are supported by inferences reasonably drawn from the
6 record.").

7 The Court concludes that the ALJ provided clear and convincing reasons,
8 supported by substantial evidence, for rejecting Plaintiff's symptom claims.

9 **B. Medical Opinions**

10 There are three types of physicians: "(1) those who treat the claimant
11 (treating physicians); (2) those who examine but do not treat the claimant
12 (examining physicians); and (3) those who neither examine nor treat the claimant
13 [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir.2001)(citations omitted).

14 Generally, a treating physician's opinion carries more weight than an examining
15 physician's, and an examining physician's opinion carries more weight than a
16 reviewing physician's. *Id.* If a treating or examining physician's opinion is
17 uncontradicted, the ALJ may reject it only by offering "clear and convincing
18 reasons that are supported by substantial evidence." *Bayliss v. Barnhart*, 427 F.3d
19 1211, 1216 (9th Cir.2005). Conversely, "[i]f a treating or examining doctor's
20

1 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by
2 providing specific and legitimate reasons that are supported by substantial
3 evidence." *Id.* (citing *Lester*, 81 F.3d at 830–831). "However, the ALJ need not
4 accept the opinion of any physician, including a treating physician, if that opinion
5 is brief, conclusory and inadequately supported by clinical findings." *Bray v.*
6 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009)(quotation and
7 citation omitted). Plaintiff argues the ALJ erroneously considered the opinions of
8 treating physician Dr. Patrick Waber from April 2013, December 2013, and
9 January 2015. ECF No. 13 at 14-17.

10 In April 2013, as part of a treatment note, Dr. Waber noted "Things are
11 relatively stable, [Plaintiff] is having some increased difficulty with getting around
12 and standing for longer periods of time. She was wondering about this ability, we
13 did discuss this. She would have difficulty doing any type of job that requires
14 standing for any length of time or walking any distances." Tr. 290. The ALJ noted
15 this statement "does not preclude sedentary work," and accorded the opinion "great
16 weight." Tr. 24. Plaintiff argues the ALJ erred by granting "great weight" to Dr.
17 Waber's 2013 opinion that Plaintiff "would have difficulty doing any type of job
18 that requires standing for any length of time or walking any distance;" while
19 simultaneously finding that the opinion "does not preclude sedentary work," and
20 assessing an RFC that Plaintiff could "stand and/or walk (with normal breaks) for a

1 total of about 2 hours in an 8-hour workday,” and stand/walk “20 minutes an
2 occurrence before needing to sit again for 20 minutes.” ECF No. 13 at 14-15; Tr.
3 19. Specifically, Plaintiff contends the ALJ “misconstrues” Dr. Waber’s 2013
4 opinion, which, according to Plaintiff, “was that she *could not* stand ‘for any length
5 of time’ or walk for ‘any distances’ in a work setting.” ECF No. 13 at 15 (citing
6 Tr. 290) (emphasis added). This argument is unavailing. Dr. Waber’s 2013
7 opinion states that Plaintiff “*would have difficulty* doing a job that requires
8 standing for any length of time or walking any distance;” not, as seemingly
9 contended by Plaintiff, that she was entirely barred from those activities.
10 Moreover, the entirety of Dr. Waber’s 2013 opinion additionally notes that
11 Plaintiff was “relatively stable” and was “having difficulty getting around and
12 standing *for longer periods of time.*” Tr. 290 (emphasis added). Finally, the
13 narrative portions of Dr. Waber’s later opinions in 2013 and 2015 state that he was
14 “unable to stand or walk for *long* distances or *prolonged* times;” which the ALJ
15 specifically found to be consistent with the April 2013 opinion. Tr. 25, 383, 391.
16 For all of these reasons, in the context of the entire record, it was reasonable for the
17 ALJ to infer that the limitations assessed by Dr. Waber in April 2013 were not
18 intended to restrict Plaintiff to absolutely no standing and/or walking. *Tommasetti*,
19 533 F.3d at 1040 (ALJ may draw inferences logically flowing from evidence);
20 *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989). Thus, the Court finds the

1 ALJ properly considered Dr. Waber's April 2013 opinion, and the assessed RFC is
2 consistent with his opined limitations. *See Turner v. Comm'r of Soc. Sec.*, 613
3 F.3d 1217, 1222-23 (9th Cir. 2010) (ALJ's RFC findings need only be consistent
4 with relevant assessed limitations and not identical to them).

5 In December 2013 and January 2015,² Dr. Waber completed a "Medical
6 Report." Tr. 381-83, 390-91. In both reports, Dr. Waber diagnosed chronic pain
7 left leg, and progressive back pain. Tr. 381, 390. He opined that Plaintiff would
8 have to lie down during the day "multiple times up to 1 hour at a time;" elevate her
9 leg during the day up to one hour at a time; miss 4 or more days per month if
10 attempting to work a 40-hour per week schedule; and her exertional level was
11 "severely limited," defined as unable to lift at least 2 pounds or unable to stand/or
12 walk. Tr. 381-83, 390-91. In the narrative section of both opinions, Dr. Waber
13 further opined that Plaintiff is "unable to stand or walk for long distances or
14 prolonged time due to previous leg injury and progressive back pain that she must
15 lie down to relieve." Tr. 383, 391. The ALJ granted Dr. Waber's opinions "little
16 to no weight." Tr. 24-25. Because his opinion was contradicted by Dr. Gordon
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19 ² These opinions are considered jointly in the parties' briefing and the ALJ's
20 decision; thus, the Court will do the same.

1 Hale (Tr. 96-99), the ALJ was required to provide specific and legitimate reasons
2 for rejecting Dr. Waber's opinions. *Bayliss*, 427 F.3d at 1216.

3 First, the ALJ found Dr. Waber's "treatment notes ... do not reflect or
4 support the limitations he indicated on [the December 2013 and January 2015
5 opinions]. The limitations are much more restrictive than what he assessed in
6 April 2013, yet there is no objective medical evidence of worsening, or any
7 evidence he had seen [Plaintiff] since November 2013." Tr. 24-25. A
8 "discrepancy" between a treating provider's clinical notes and that provider's
9 medical opinion is an appropriate reason for the ALJ to not rely on that opinion
10 regarding the claimant's limitations. *See Bayliss*, 427 F.3d at 1216. In further
11 support of this reasoning, the ALJ notes that Dr. Waber included limitations (the
12 "need for a cane, need to lie down") in the December 2013 and January 2015
13 opinions, that were "never mentioned before in his treatment notes."³ Tr. 25.

14

15 ³Later in the decision, the ALJ again remarked that Dr. Waber "added limitations
16 never mentioned in his treatment notes (e.g., need for a cane, need to lie down);"
17 and found, seemingly based on this evidence, that "it appears Dr. Waber relied
18 quite heavily on [Plaintiff's] subjective reports of symptoms and limitations." Tr.
19 25. An ALJ may reject a physician's opinion if it is based "to a large extent" on
20 Plaintiff's self-reports that have been properly discounted as incredible.

1 Plaintiff argues the April 2013 opinion was consistent with the latter opinions
2 because they “all consistently opined that [Plaintiff] could not perform any work
3 that would require prolonged standing or walking in any capacity.” ECF No. 13 at
4 15. However, as discussed above, Dr. Waber’s April 2013 treatment note did not
5 opine that Plaintiff *could not* perform work or assess any specific limitations
6 regarding standing and walking; nor did that treatment note opine that Plaintiff
7 needed to lie down during the day for an hour at a time. Tr. 290. Thus, it was
8 reasonable for the ALJ to note that the limitations assessed in December 2013 and
9 January 2015 were more restrictive than those assessed in April 2013. More
10 notably, Plaintiff fails to challenge the ALJ’s finding that Dr. Waber’s treatment
11 notes do not support the limitations opined in December 2013 and January 2015.

12

13 *Tommasetti*, 533 F.3d at 1041. However, the Court finds this evidence is more
14 appropriately considered as evidence of the discrepancy between the opinion and
15 Dr. Waber’s treatment notes, as discussed herein; and does not, standing alone,
16 support a finding that Dr. Waber’s opinions relied *in large part* on Plaintiff’s
17 subjective reports. However, this error in reasoning is harmless because the ALJ’s
18 ultimate conclusion regarding Dr. Waber’s December 2013 and January 2015
19 opinions is adequately supported by substantial evidence. *See Carmickle*, 533 F.3d
20 at 1162-63.

1 *See Carmickle*, 533 F.3d at 1161 n.2 (court may decline to address issue not raised
2 with specificity in Plaintiff's briefing). The inconsistencies between Dr. Waber's
3 treatment notes, and the restrictive limitations he opined December 2013 and
4 January 2015, was a specific and legitimate reason to reject those opinions.

5 Second, the ALJ found that Dr. Waber "failed to explain the type of
6 significant clinical and laboratory abnormalities that would lead to such severe
7 limitations and gave no medical evidence to support the limitations (e.g., no
8 impairments to reasonably [sic] limited lifting to 2 pounds)." ⁴ Tr. 25. The ALJ
9 need not accept the opinion of any physician, including a treating physician, if that

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11 ⁴ Plaintiff correctly notes that, based on the accompanying narrative, Dr. Waber
12 checked the "severely limited" box in these opinions likely based on limitations in
13 Plaintiff's ability to stand/walk, rather than an inability to lift at least two pounds.
14 ECF No. 13 at 15-16. However, the ALJ's error in referencing Plaintiff's lifting
15 ability as an example of assessed limitations unsupported by clinical findings, as
16 opposed to her standing/walking ability, is harmless because it was inconsequential
17 to the ultimate disability finding. *Molina*, 674 F.3d at 1111 (an error is harmless
18 "where it is inconsequential to the [ALJ's] ultimate nondisability determination").
19 As discussed above, Dr. Waber does not offer the requisite clinical findings to
20 support any of his assessed limitations.

1 opinion is brief, conclusory and inadequately supported by clinical findings. *Bray*,
2 554 F.3d at 1228; *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th
3 Cir. 2004) (ALJ may discredit a physician's opinion that is unsupported by the
4 record as a whole or by objective medical findings); *see also Crane v. Shalala*, 76
5 F.3d 251, 253 (9th Cir. 1996) (opinions on a check-box form or report which do
6 not contain significant explanation of the basis for the conclusions may be
7 accorded little or no weight). Plaintiff argues that Dr. Waber adequately supported
8 his opinions by noting Plaintiff had a shortened left leg from previous trauma and
9 surgery, chronic lymphedema of the left leg, difficulty walking, and progressive
10 lower back pain. ECF No. 13 at 16 (citing Tr. 381, 390). However, it was
11 reasonable for the ALJ to find Dr. Waber's general reference to these "signs,"
12 without specific citation to objective or clinical findings, does not adequately
13 support the severity of the assessed limitations. *See Burch*, 400 F.3d at 679.
14 Plaintiff further contends that Dr. Waber's opinion is based on "significant
15 experience" and "numerous records," and is therefore "entitled to weight that an
16 otherwise unsupported and unexplained check-box form would not merit." ECF
17 No. 13 at 16-17 (citing *Garrison*, 759 F.3d at 1013). However, as noted by the
18 ALJ, Plaintiff only saw Dr. Waber seven times during the adjudicatory period. Tr.
19 22. Moreover, the ALJ recounted Dr. Waber's treatment notes in detail as part of
20 the decision; and these records do not appear to include clinical observations or

1 objective testing that would qualify as “significant explanation” of the basis for his
2 conclusion that Plaintiff would need to lie down throughout the day for an hour at a
3 time, or that she was unable to stand or walk. Tr. 21-22; *see Crane*, 76 F.3d at
4 253. For all of these reasons, Dr. Waber’s failure to adequately explain the severe
5 findings in the December 2013 and January 2015 opinions was a specific and
6 legitimate reasons for the ALJ to reject Dr. Waber’s opinion.

7 Third, the ALJ found Dr. Waber’s December 2013 and January 2015
8 opinions were each “internally inconsistent as he checked a box for ‘unable to
9 stand and/or walk’ but then hand-wrote that [Plaintiff] was ‘unable to stand or walk
10 for long distances or prolonged times.’ These standing/walking restrictions are not
11 the same in severity, and the latter actually supports his April 2013 opinion.” Tr.
12 25. Internal inconsistencies within a physician’s report constitute relevant
13 evidence when weighing medical opinions. *Morgan v. Comm’r Soc. Sec. Admin.*,
14 169 F.3d 595, 603 (9th Cir. 1999). Plaintiff argues the opinions are “consistent, or
15 at least similar.” ECF No. 13 at 16. However, the ALJ is responsible for resolving
16 conflicts in medical testimony, and resolving ambiguity. *See Andrews*, 53 F.3d at
17 1041. Moreover, the Court notes that individual medical opinions are preferred
18 over check-box reports. *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983).
19 Their internal inconsistency was a specific and legitimate reason to reject Dr.
20 Waber’s December 2013 and January 2015 opinions.

1 Finally, Plaintiff generally argues the ALJ erred by rejecting Dr. Waber's
2 opinions "in favor of the opinions of non-examining medical advisor Dr. Hale."
3 ECF No. 13 at 18. However, while an ALJ generally gives more weight to Dr.
4 Waber's opinion, as a treating physician, than to Dr. Hale's opinion, as a
5 nonexamining reviewing physician; Dr. Hale's opinion may nonetheless constitute
6 substantial evidence if it is, as specifically noted by the ALJ in this case, consistent
7 with other independent evidence in the record. Tr. 24; *Thomas*, 278 F.3d at 957;
8 *Orn*, 495 F.3d at 632–33. Additionally, Plaintiff contends that the ALJ improperly
9 relied on Dr. Hale's opinion when formulating the RFC, because it was "merely [a]
10 rubber stamp" of the findings of state agency single decision maker (SDM),
11 Kathleen Foltz. ECF No. 13 at 18-19. However, as noted by the Defendant, Dr.
12 Hale considered all of the evidence in the record, including Dr. Waber's April
13 2013 opinion, which was not previously considered by Ms. Foltz. ECF No. 14 at
14 16-17. Thus, the Court finds the ALJ properly relied on Dr. Hale's opinion, which
15 was granted great weight because it was "consistent with the objective medical
16 evidence as a whole;" and the assessed limitations were properly considered in
17 formulating the RFC. Tr. 24.

18 The Court finds the ALJ properly considered the medical opinion evidence,
19 including Dr. Waber's April 2013, December 2013, and January 2015 opinions.

20 **C. Duty to Develop the Record**

1 The record includes photographs of Plaintiff's feet and legs. Tr. 387-89.
2 The ALJ considered the photographs, and found they "are of no value to me as I
3 am not a physician," and "do not add to the medical evidence already reviewed."
4 Tr. 25. Plaintiff argues the ALJ's "non-medical expertise does not justify the
5 rejection of this probative evidence;" and further contends that the ALJ failed in
6 his duty to develop the record "in order to properly evaluate" the photographs.
7 ECF No. 13 at 19. However, "[a]n ALJ's duty to develop the record is triggered
8 only when there is ambiguous evidence or when the record is inadequate to allow
9 for proper evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-60
10 (9th Cir. 2001). Here, the ALJ considered the pictures and reasonably concluded
11 that they do not add to the medical evidence of record. Tr. 25. The Court is unable
12 to discern any inadequacy or ambiguity that did not allow for proper evaluation of
13 the record as a whole. *See Bayliss*, 427 F.3d at 1217. Thus, the ALJ did not err in
14 failing to further develop the record in this case.

CONCLUSION

16 A reviewing court should not substitute its assessment of the evidence for
17 the ALJ's. *Tackett*, 180 F.3d at 1098. To the contrary, a reviewing court must
18 defer to an ALJ's assessment as long as it is supported by substantial evidence. 42
19 U.S.C. § 405(g). As discussed in detail above, the ALJ provided clear and
20 convincing reasons to discount Plaintiff's symptom testimony, properly weighed

1 the medical opinion evidence, and did not err in his duty to develop the record.

2 After review the court finds the ALJ's decision is supported by substantial

3 evidence and free of harmful legal error.

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment, ECF No. 13, is **DENIED**.

6 2. Defendant's Motion for Summary Judgment, ECF No. 14, is

7 **GRANTED.**

8 The District Court Executive is hereby directed to enter this Order and

9 provide copies to counsel, enter judgment in favor of the Defendant, and **CLOSE**

10 the file.

11 **DATED** April 3, 2018.

12 _____
13 *s/Fred Van Sickle*
14 Fred Van Sickle
15 Senior United States District Judge